IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.89/2000

S T A T E
Through Public Prosecutor,
High Court of Bombay at Panaji. .... Appellant.

V/s.

1) Francis Mendez,
S/o. Constancio Minguel Mendes,
Motorcycle Rider and Fisherman,
R/o. Near Ganpati Temple,
Bogda, Vasco,
(Expired - appeal stands abated as
per order dated 30.4.2001.

2) Constancio Minguel Mendez,
S/o. late Gregory Mendez,
Fisherman, R/o. H.No.211,
Desteriowaddo, Vasco da Gama.

3) Mrs. Perpetua Gracias,
wife of Cruz Gracias,
Housewife, r/o 3rd Ward,
Near St. Anthony Chapel,
Colva, Salcete.

4) Smt. Eliza Furtado,
Wife of Succor Furtado,
Housewife, r/o. H.No. 108,
Pixem Dongri, Vasco. .... Respondents/
Accused.

Mr.A.P. Lawande, Public Prosecutor for the State.

Mr. V.R. Tamba, Advocate for the respondents/accused.

CORAM : V.C. DAGA &
P.V. HARDAS, JJ.

DATE : JULY 10, 2002.

ORAL JUDGMENT: (Per P.V.HARDAS, J).

The State being aggrieved by the acquittal of

respondents No. 2, 3 and 4 for the offences punishable Sections 324 and 302, read with 34 of the Indian Penal Code, has filed the present appeal. The Sessions Judge, South Goa, Margao, by Judgment dated 19.7.2000, in Sessions Case No.23/1997, had acquitted the present respondents No.2,3 and 4/original accused Nos.2, 3 and 4 in respect of the above offences. Learned Sessions Judge had, however, convicted the original accused No.1, Francis Mendez for offences punishable under Sections 324 and 304 (I) of the Indian Penal Code and had sentenced him to undergo Rigourous Imprisonment for six months and to pay a fine of Rs.1,000/-, in default one month Simple Imprisonment, and Rigourous Imprisonment for seven years and to pay a fine of Rs.15,000/-, in default, to undergo Simple Imprisonment for two years, respectively. The appeal filed by the original accused No.1, Francis Mendez, i.e. Criminal Appeal No.57/2000 was admitted by this Court. However, during the pendency of the said appeal, the appellant/original accused No.1, Francis Mendez, expired and, therefore, Criminal Appeal No.57/2000 had abated. This appeal, which challenges acquittal of Francis Mendez for an offence punishable under Section 302, also abates against him. The State appeal against acquittal is, therefore, restricted to respondents No.2, 3 and 4.

2. The brief facts, necessary for the decision

of the appeal, are set out hereunder:

In May, 1997, Pw.31, Nolaso Raposo was attached to the Vasco Police Station and was also holding an additional charge at Baina Out Post. On 21.5.1997, at about 7.00 p.m., Pw.4, Cosme Mendes came to the Out Post with a bleeding injury on the chest. Pw.4, Cosme Mendes informed Pw.31, P.S.I., Nolasco Raposo that he had been stabbed by accused No.1, Francis Mendez. A police jeep was arranged and he was sent to Cottage Hospital Chicalim. Pw.31, PSI Raposo then visited the hospital and learnt that one Anthony Mendes had also been assaulted by accused No.1 and had been referred to hospital. Pw.31, P.S.I. Raposo, therefore, went to the Vasco Police Station, where he was informed that a wire-less message had been received from the Goa Medical College that the injured Anthony Mendez had expired in the hospital at about 22.30 hours. Pw.1, Gregorio Mendes came to the Vasco Police Station and lodged a complaint against accused Nos. 1, 2, 3 and 4. The said complaint is at Exhibit 14. In the said complaint, it had been stated that at about 6.30 p.m., accused No.1 had assaulted Pw.4, Cosme and the deceased with a 'gupti'; accused No.2 had assaulted deceased, Anthony with a danda and accused No.1 had assaulted the deceased with a broom, while accused No.4 was instigating accused no.1 to stab the deceased. On the basis of the said report, an

offence came to be registered against the accused and the accused were arrested. In the presence of Pw.17, Vaman Coutankar, scene of offence panchanama at Exhibit 95 was drawn. The clothes of the accused No.1 came to be attached. Similarly, clothes of accused No.2 also came to be attached. Multi-coloured frock of accused No.3 was attached. The said frock is MO.No.3. A pinkish frock, MO.No.4 was also attached. On the next day, the inquest panchanama vide Exhibit Pw.24 was drawn in the presence of Pw.3, Francis Pereira and the Doctor was requested to conduct post-mortem examination of the deceased vide letter exhibit Pw.130. The post-mortem was conducted by Pw.2, Dr. Rodrigues, who found one incised penetrated stab wound of 1 cm. x margins opposed and inverted triangular shape on left side middle front of chest. On internal examination, he found a cut in skin, sub-cutaneous tissue and left side intercostal muscle in fifth intercostal space. There was a through and through cut in the anteromedial margin of upper lobe of left lung, resulting in left haemothorax of fluid blood with blood clots with collapse and upward and backward displacement of left lung and had cut on the anteromedial part of pericardium and left ventricle were cut. It had emerged out of the heart muscle and pericardial sac. According to Pw.2, Dr. Rodrigues, the injury was by sharp, pointed, penetrating cutting weapon and was ante-mortem in nature. In his opinion, the death was due

to haemorrhage and shock as a result of stab injury to the left lung and heart, resulting in haemothorax and haemopericardium. He further opined that the injury could be caused by the knife, MO. 5. Pw.31, then handed over investigation to Pw.32, P.I. Aga.

3. Pw.32, P.I. Aga states that he was working as P.I., Vasco Police Station and on 22.5.1997, took over investigation from P.S.I. Raposo. He had drawn the panchanama of the scene of offence vide Exhibit 17 and under his direction, sketch of the scene of offence vide Exhibit 22 was prepared. Photographs of the scene of offence were taken by Pw.28, Salim. Accused No.1 had allegedly made a disclosure statement in presence of Pw.9, Francis and one Franklin. The panchanama is at Exhibit 79 which led to the discovery of knife in the house of accused No.1 at Dasteriowaddo. The knife had been kept on a wooden cupboard, which was not otherwise visible.

4. The shirt of Cosme Mendez, Pw.4 came to be attached under the panchanama, Exhibit 85 in the presence of Pw.12, Abdul Shaik. On 29.5.1997, accused No.3 agreed to disclose the broom. Accordingly, her statement was recorded vide Panchanama, Exhibit 95 in the presence of Pw.18, Vithal Gurav. Accused No.3 led panchas and the police party to the house of accused No.2 and pointed out

the broom in the store-room. The said broom was of palm leaves and came to be attached. On 30.5.1997, accused No.2 made a disclosure statement in respect of the danda in the presence of Pw.10, Digambar Amonkar, which was attached under panchanama Exhibit 81. Accused No.2 led the panchas and the police to his house where he removed a danda which was hidden under a cot. The danda came to be seized by the police. On 1.6.1997, the cover of the knife came to be attached in the presence of Pw.22, Sidappa Wadar (Pw.22) from the house of accused No.1 vide panchanama Exhibit 109. The said cover was identified as MO.7. Vide Exhibit 132, muddemal was sent to the Central Forensic Science Laboratory, Hyderabad. The report of the C.F.S.L. Hyderabad is at Exhibit 135. After completion of the investigation, Charge-sheet against the accused came to be filed. On committal, the learned Sessions Judge, South Goa, Margao framed charges against the accused for the offences punishable under Sections 324 and 302, read with 34 of the Indian Penal Code. The accused abjured their guilt and claimed to be tried.

5. The learned trial Judge accepted the prosecution case as against accused No.1 and convicted him for an offence punishable under Section 324 of the Indian Penal Code in respect of causing injury to Pw.4, Cosme and under Section 304(I) in respect of causing death of the deceased, Anthony Mendez. The learned Trial

Judge gave benefit of doubt to original accused Nos.2, 3 and 4 and acquitted them of the aforesaid charges. Hence this appeal by the State.

6. Pw.1, Gregorio Mendes is the brother of original accused No.1 and son of original accused No.2. He states that his deceased brother was residing in one of the rooms of the big house, of which original accused No.2 was a mundkar. He further states that there were disputes between the brother and accused No.2 in connection with the house. There were complaints filed against each other. He further states that on 21.5.1997, at about 4.00 p.m. he had gone to the beach. While he was cleaning his boat at about 5.30 p.m., one person by name Richard came and started helping Pw.1. At about 6.30 p.m., Pw.1, Gregorio told the said Richard to change his clothes so that he could accompany him to the market. Pw.1 states that as he was returning home, Richard called him from the road and told him that Francis (Accused No.1) had stabbed Cosme with a knife. On hearing this, he went running and saw that Cosme had fallen and blood was oozing out. Cosme along with his wife went to the police station. Since Pw.4, Cosme had told Pw.1 to see Anthony, Pw.1, Gregorio went to see Anthony. He saw accused No.3 assaulting the deceased, Anthony with a broom and he heard accused No.4 telling accused No.1 to stab Anthony. At that time accused No.1 Francis stabbed

Anthony with a big knife on the left side of his chest. As Anthony was bleeding, accused No.2, Constancio hit a danda on the neck of Anthony and he fell down on the ground. He further states that he put Anthony in a van and took him to Sanjeevani Hospital at Vasco, where he was advised by one Dr. Dessai to shift Anthony to Bambolim Hospital. He further states that Anthony expired on the way to the hospital. Thereafter, he states that he lodged the complaint, exhibit 14.

7. Pw.4, Cosme Mendes has been examined by the prosecution and he states that accused No.1, Francis removed a knife from the motor cycle and stabbed him behind his shoulder. Thereafter, he says that accused No.3 hit him with a broom of palm leaves and accused No.4 gave him kicks. He then states that thereafter, he saw the deceased, Anthony running towards the house and saw his father, accused No.2 near the door with a danda in his hand. Thereafter, he does not refer to the incident of stabbing of Anthony.

8. Pw.16, Thereza Mendes, wife of Pw.4, Cosme Mendes states that accused No.1, Francis took out a knife from the motor cycle and rushed towards her husband. Her husband, Pw.4 on seeing accused No.1, Francis, started running. She further states that accused No.1 gave a knife blow on the back of Pw.4, due to which he fell

down. Thereafter, accused No.1, Francis gave another knife blow on the left side of the chest. She states that thereafter, accused Nos.3 and 4 were assaulting her husband with a broom, fist blows and kicks. In cross examination, she admitted that she had not stated to the police that accused No.3 had assaulted Pw.4 with a broom and accused No.4 was telling accused No.1, Francis to assault Pw.4 with knife.

9. Learned Trial Court, at para 29 of the Judgment, after carefully scrutinizing the prosecution evidence, has held that in the absence of any independent corroboration either from the medical evidence or from independent witnesses it was hazardous to convict accused No.3, Perpetua and accused No.4, Eliza. The learned Trial Court, therefore gave the benefit of doubt to accused No. 3 and accused No.4. As far as accused No.2 is concerned, the learned trial Court held that accused No.2 is not at all implicated in the incident of stabbing of Pw.4, Cosme and deserved to be acquitted

10. We have carefully examined the evidence tendered by the prosecution in respect of the assault on Pw.4, Cosme and we are in agreement with the findings recorded by the learned trial Court for acquittal of respondents No.2, 3 and 4.

11. In respect of the incident of stabbing of deceased, Anthony, the prosecution has also examined Pw.15, Milagres Rebello. He is the brother-in-law of the deceased. According to him, on hearing some noise near the house of the accused, he saw accused No.2 assaulting deceased with a danda and having lifted that danda as if to strike someone. The deceased warded off the danda blow by lifting his hands. According to him, accused Nos.3 and 4 caught hold of the deceased and accused No.1 stabbed the deceased on the left side of his chest. The learned trial Court, at para 41 of the Judgment has held that Pw.15 was not present at the scene of the offence. According to the learned Trial Court, if Pw.15, Milagres was present, he would have been able to state in what position the deceased was assaulted. In fact, in the cross examination, Pw.15, Milagres has admitted that he could not say whether the deceased was sitting, standing or had fallen on the ground when he was assaulted. He also states that he did not see Pw.5, Domentina Mendes, the widow of the deceased. Pw.15 also does not speak about the presence of Pw.4, Cosme. He has also given a version regarding accused No.3 and accused No.4 catching the deceased and that accused No.1 stabbing the deceased. The Trial Court, therefore, disbelieved the evidence of Pw.15, Millagres.

12. The prosecution has also examined Pw.26,

Narsin Mendes, daughter of Pw.4, Cosme Mendes. She is a child witness, aged about 13 years. According to her, accused No.1 came towards her father, Pw.4 with a knife and assaulted him. She states that accused No.3 was assaulting her father with a broom and accused No.4 was giving kicks to him. According to her, she had not witnessed the assault on the deceased, Anthony. Learned Trial Court has given reasons as to why the evidence of Pw.26 does not inspire any confidence.

13. The Prosecution has examined Pw.5, Domentina Mendes, the widow of deceased, Anthony, who states that Pw.26, Narsin Mendes came running and informed her that Pw.4 was being assaulted by the accused. On hearing this, deceased Anthony went out of the house and she followed him and she saw accused No.3, Perpetua assaulting the deceased, Anthony with a broom and she also saw accused No.2 giving a danda blow, which was warded off by the deceased. She further states that accused No.3 and accused No.4 caught the hands of the deceased, Anthony and accused No.1 stabbed him.

14. The learned Trial Court, in para 45 of the Judgment has carefully scrutinized the evidence of Pw.1, Gregorio and Pw.5, Domentina and has found that the version of Pw.1, Gregorio and Pw.5, Dumentina is corroborated by the medical evidence of Pw.2, Dr.

Rodrigues in so far as the role of accused No.1 in stabbing the deceased, Anthony with a knife is concerned. Pw.5, Dumentina does not refer to the fact that accused No.4, Elisa was telling accused No.1, Francis to stab the deceased. Pw.5, Dumentina does not speak about the deceased being held by accused No.3. The learned Trial Court has also found that in respect of the independent version of Pw.1, Gregorio and Pw.5, Dumentina are at variance. The medical evidence does not corroborate any assault by accused No.3 and accused 4 or by accused No.2. Therefore, the learned trial Court gave benefit of doubt to accused Nos.2, 3 and 4. The learned trial Court convicted the original accused No.1 for an offence punishable under Section 324 in respect of causing injuries to Pw.4, Cosme and under Section 304(I) of the Indian Penal Code in respect of the death of the deceased, Anthony.

15. With the assistance of the learned Counsel for the parties, we have perused the evidence and also perused the Judgment of the learned Trial Court. The reasons given by the Trial Court for acquitting the respondents No.2, 3 and 4 are not perverse. This is an appeal against acquittal and we are conscious of the fact that if no perversity in the reasonings of the learned trial Court is demonstrated, the High Court would not substitute its own findings in place of the trial Court,

merely because a second view is possible. As pointed out by us earlier, the view taken by the learned Trial Court, on appreciation of the evidence, does not appear to be a perverse view. Therefore, we are not inclined to interfere with the acquittal of respondents No.2, 3 and 4. The appeal, as against respondent no.1 abates in view of his death. The appeal against conviction filed by accused No.1, Francis also abates in view of his death.

16. In the result, therefore, the Criminal Appeal No.89/2000 is devoid of any merit and the same is dismissed.

V.C. DAGA, J.

P.V. HARDAS, J.

ssm.